

JAMES C. STROME)	
Claimant)	
VS.)	
)	
)	Docket No. 162,253
N.R. HAMM QUARRY)	
Respondent)	
AND)	
)	
U.S.F. & G. & CNA)	
Insurance Carriers)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

By an Award entered on June 10, 1994, the Administrative Law Judge originally found that claimant had failed to establish a compensable injury. The Appeals Board reversed that finding by the Administrative Law Judge and remanded the case for findings

on nature and extent, average weekly wage, future medical benefits, liability of the Kansas Workers Compensation Fund, and temporary partial benefits. On remand, the Administrative Law Judge awarded benefits for 20 percent work disability from February 3, 1992 through June 30, 1993, and a 64 percent work disability thereafter. The Administrative Law Judge also found the average weekly wage to be \$721.64, found claimant had been overpaid temporary partial benefits, found claimant is entitled to future medications, and found the Kansas Workers Compensation Fund should be liable for 100 percent of the award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments the Appeals Board finds that the decision by the Administrative Law Judge ruling as to Fund liability should be reversed but that the Award in all other respects should be affirmed.

Before addressing the issues decided by the Administrative Law Judge on remand, the Appeals Board notes the Workers Compensation Fund and respondent have, in the appeal, disputed the findings made by the Appeals Board on the original appeal. The Fund and respondent both restate their arguments regarding whether claimant met with personal injury or occupational disease arising out of and in the course of his employment. The Fund and respondent also challenge the earlier findings of the Appeals Board regarding the date of accident, timely notice, and timely written claim. Certain of the arguments warrant comment.

The Workers Compensation Fund and CNA, one of the insurance carriers for the respondent, argue that the date of accident should either be 1989 or during subsequent employment with Custom Metal Fabricators. If the later date is used, they argue full responsibility for benefits should be imposed on the subsequent employer, Custom Metal Fabricators, where claimant worked from February 3, 1992 through June 30, 1993. Both parties find fault with the application of Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994) to this case. The Appeals Board notes that the Berry decision suggests that it would apply to either an accidental injury or an occupational disease. The Berry decision, in fact, cites K.S.A. 44-5a06 and implies that the statute for occupational diseases requires the date of accident for the occupational disease be the same as that required by the rationale of the Berry, *supra*, decision. The Appeals Board, therefore, reaffirms its previous findings in all respects.

(1) Nature and Extent of Disability.

The Appeals Board agrees with and affirms the finding by the Administrative Law Judge that claimant is entitled to benefits for a work disability of 20 percent during the period claimant worked for Custom Metal Fabricators and that is from February 3, 1992 through June 30 1993, and a 64 percent work disability thereafter. The Appeals Board hereby adopts as its own the findings of fact and conclusions of law stated by the Administrative Law Judge relating to the nature and extent of claimant's disability.

Counsel for CNA has argued there is no authority in the Workers Compensation Act for awarding a work disability for an occupational disease case. Although CNA cites no authority for this argument, the Appeals Board assumes the argument is based upon appellant decisions which indicated disability for occupational disease has been computed differently from disability for accidental injury. Knight v. Hudiburg-Smith Chevrolet, Olds., Inc. 200 Kan. 205, 435 P.2d 3 (1967); Schubert v. Peerless Products, Inc., 223 Kan. 288, 573 P.2d 1009 (1978).

The Knight v. Hudiburg, *supra*, decision was the first to require that disability for occupational disease be measured differently than for accidental injury. At the time the Kansas Supreme Court rendered its decision in Knight, benefits were calculated according to K.S.A. 44-510 the following formula:

"In case of temporary or permanent partial disability not covered by schedule the workman shall receive during such period of temporary or permanent partial disability not exceeding four hundred fifteen (415) weeks, sixty percent (60%) of the difference between the amount he was earning prior to said injury as in this act provided and the amount he is able to earn after such injury in employment . . ."

The Knight decision followed the Supreme Court's definition of disability for accidental injury in Puckett v. Minter Drilling Co., 196 Kan. 196, 410 P.2d 414 (1966). In Puckett the Court ruled that, for accidental injuries, the disability was based on the employee's ability to earn wages injurywork of the same type and character he was performing before he was injured, not the ability to earn wages in any type of work.

In the Knight decision, the Supreme Court considered the application of the Puckett analysis to occupational diseases cases. The Court noted that K.S.A. 44-5a04 authorized the director to cancel benefits for an employee who, after disablement by disease, returned to work at the same wage in any employment. The Court concluded that those statutes required that disability for occupational disease be based upon the claimant's ability to earn wages in work of any type or kind, not only the type of work claimant was performing at the time of injury. The Supreme Court, therefore, adjusted the definition of disability to accommodate this special focus of the occupational disease statutes on the claimant's ability to perform any kind of work.

The Knight decision was analyzed in Schubert v. Peerless Products, *supra*. The Supreme Court there described the Knight decision as follows:

"The *Knight* case reaches only two conclusions: (1) The capacity to earn wages from any trade or employment is relatable to the amount of compensation due, and (2) an award for an occupational disease is not measured by the workman's ability to perform work of the same type and character he was able to perform before he was injured."

In Schubert, the Court mentions that K.S.A. 44-5a01 gives employees disabled by occupational disease the same benefits as those disabled by accidental injury except as specifically provided otherwise for occupational disease. The Court reaffirms the holding in Knight that the general provisions for occupational disease require an exception to the general measure of disability used for accidental injury. Specifically, the disability for occupational disease must be measured by loss of ability to earn wages from any work.

Statutory definitions of disability have changed since the Knight and Schubert decisions. The definitions of work disability in effect at the time of the present case do not, in our view, require the adjustment made by the Court in the Knight decision. The applicable definitions of work disability are based upon the claimant's ability to perform any kind of work. K.S.A. 1991 Supp. 44-510e (Purse) defines work disability as:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation . . ."

Under the applicable measure of disability for accidental injury, ability to earn from any trade or employment is relatable to the amount of compensation due. The Knight decision requires nothing more or different for occupational disease. The Appeals Board therefore concludes that under the applicable definitions of disability, the definitions used for accidental injury may also be used for occupational disease to determine the extent of a general body disability.

U.S.F. & G. offers a separate challenge to the decision by the Administrative Law Judge. U.S.F. & G. has attached exhibits to its brief relating to pay claimant has received in subsequent employment. These exhibits were not part of the original record in this case and for that reason cannot be considered by the Appeals Board. U.S.F. & G. suggests the case should be remanded for reconsideration of the work disability based upon this new evidence. The Appeals Board considers review and modification under K.S.A. 44-528 to be the appropriate remedy for introducing such new evidence, not remand at this point of the proceedings.

For the above reasons, the Appeals Board agrees with and adopts as its own the findings of fact and conclusions of law by the Administrative Law Judge relating to the nature and extent of claimant's disability.

(2) Average Weekly Wage.

The Appeals Board agrees with and affirms the finding by the Administrative Law Judge that claimant's average weekly wage was \$721.64. The Appeals Board finds for the reasons stated by the Administrative Law Judge in his Award. Specifically, the Appeals Board agrees the testimony of Mr. Sedlock is the most convincing evidence as to claimant's average weekly wage and agrees with the finding of \$721.64 per week based on that evidence.

(3) Overpayment of temporary partial disability benefits.

The Appeals Board agrees with the decision by the Administrative Law Judge that the claimant was overpaid temporary partial disability benefits. Specifically, the Appeals Board agrees that temporary partial disability benefits are intended to cover the period following the injury before claimant reaches maximum medical improvement. The claimant was, in fact, overpaid temporary partial benefits for a period when permanent partial benefits would not be appropriate. The Appeals Board also agrees that temporary partial benefits paid for that period should be credited against the obligation to pay permanent partial disability benefits.

(4) Future medical expenses.

The evidence establishes claimant will have an ongoing need for medication. The parties do not dispute the award of future medical except as corollary to their disagreement regarding compensabilities. The Appeals Board agrees with and adopts the findings by the Administrative Law Judge relating to future medical expenses. Specifically, it agrees that the award for future medication is approved and other medical treatment should be upon proper application only.

(5) Fund liability.

The Appeals Board finds that the award of liability against the Kansas Workers Compensation Fund should be reversed. The evidence in this case established that claimant had suffered some permanent sensitivity as of early 1989 and that respondent had knowledge of that impairment. The Administrative Law Judge finds that any subsequent impairment would not have occurred but for the impairment which existed as of 1989. On that basis, he awards 100 percent of liability against the Fund. The Appeals Board finds, however, that the record does not establish a basis for assessing liability against the Workers Compensation Fund. The Workers Compensation Fund would not have liability for any disability which existed as of 1989 as the respondent had no knowledge of any handicap existing prior to that time. The record does not establish the proportion of disability attributable to the preexisting impairment, and therefore establishes no basis for apportioning liability against the Kansas Workers Compensation Fund. K.S.A. 44-567. The decision to award benefits against the Fund is therefore reversed. Respondent is responsible for 100 percent of the Award.

AWARD

WHEREFORE, the Appeals Board finds that the Award by Administrative Law Judge Bruce E. Moore dated February 28, 1996 should be, and the same is hereby, modified only as to the finding of liability of the Fund and otherwise is affirmed.

The claimant is entitled to 73.71 weeks permanent partial disability compensation at the rate of \$96.22 per week or \$7,092.38 through June 30, 1993 for a 20% work disability and beginning July 1, 1993 is entitled to compensation at the rate of \$289.00 per week not to exceed \$100,000 for a 64% work disability.

As of March 1, 1996 there would be due and owing to the claimant 73.71 weeks permanent partial disability compensation at \$96.22 per week in the sum of \$7,092.38 plus 139.29 weeks permanent partial disability compensation at \$289.00 per week in the sum of \$40,254.81 for a total due and owing of \$47,347.19 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$52,652.81 shall be paid at \$289.00 per week until fully paid or until further order of the Director.

FURTHER AWARD IS MADE that claimant is entitled payment of past medical expenses and unauthorized medical expenses, if any.

Future medical will be considered upon proper application.

The Court finds claimant's attorney fee retainer is reasonable and approves such fee arrangement.

Therefore pursuant to K.S.A. 44-536, a lien is placed against the award in the amount of twenty-five (25) percent in favor of claimant's attorney, John Bryan.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and such are directed to pay costs of the transcripts as follows:

APPINO & ACHTEN REPORTING SERVICE

Deposition of Kim Strome Dated August 5, 1993	\$192.20
Deposition of Lloyd Langston Dated January 17, 1994	\$415.60
Deposition of Dr. Robert Hill Dated March 2, 1994	\$192.50
Deposition of Charlie Sedlock Dated March 2, 1994	\$261.60

Total \$1061.90

GENE DOLGINOFF ASSOCIATES, LTD.

Deposition of Dr. Brent Koprivica \$691.40
Dated October 26, 1993

OWENS, BRAKE & ASSOCIATES

Regular Hearing Transcript \$658.40
Dated January 5, 1994

DON K. SMITH & ASSOCIATES

Deposition of Dr. Curtis Drevets \$498.50
Dated January 19, 1994

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Mickey W. Mosier, Salina, KS
John David Jurcyk, Lenexa, KS
Jeffrey E. King, Salina, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director